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CITATIONS

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 600

ALCIDES PEREZ, *Petitioner,*

v.

UNITED STATES OF AMERICA, *Respondent.*

PETITIONER'S REPLY BRIEF

TITLE II OF THE CONSUMER CREDIT PROTECTION ACT IS AN UNCONSTITUTIONAL EXERCISE OF LEGISLATIVE POWER UNDER THE COMMERCE CLAUSE

A. Congress Does Not Have the Authority Under the Commerce Clause To Punish Extortionate Credit Transactions Without a Showing of a Federal Interest on a Case by Case Basis.

The Government's attempt to invoke the commerce clause to sustain Title II of the Consumer Credit Protection Act is similar to its attempt to invoke the same clause to sustain the anti-gambling statute challenged in *United States* v. *Denmark,* 346 U.S. 441 (1953).

In *United States* v. *Denmark, supra,* the Court considered a statute which prohibited the transportation of gambling devices in interstate commerce and re-

quired every manufacturer and dealer in gambling devices to register and file detailed information as to each device sold and delivered. Criminal penalties attached for failure to register or for violation of the proscription on transporting gambling devices. The Court divided into three positions. The prevailing opinion of the Court found the provision requiring the registration of local devices to present so serious a constitutional problem under the commerce clause that it concluded that the statute did not articulate with sufficient clarity its purpose to require registration of such local devices. The concurring opinion found the registration requirement too vague to be constitutionally valid. The dissent argued that Congress had in fact undertaken to require registration of local gambling devices, and that Congress could constitutionally do so to make effective the regulatory provisions applicable to interstate sales. But the dissent recognized that if Congress had undertaken to regulate local activity, rather than merely require registration, "its power would no doubt be less than clear." *United States* v. *Denmark,* 346 U.S. at 462.

Both the prevailing and the dissenting opinions lend support to the position we take here. The dissent suggests that the kind of proscription on local activity imposed by Title II of the Consumer Credit Protection Act is extremely questionable. The prevailing opinion takes the same view but with more emphasis on the departure from precedent. Justice Jackson, who authorized the prevailing opinion, stated (346 U.S. at 446-448):

> No precedent of this Court sustains the power of Congress to enact legislation penalizing failure to report information concerning acts not shown to

> be in, or mingled with, or found to affect commerce. * * * In some instances Congress has left to an administrative body, such as the Interstate Commerce Commission or the National Labor Relations Board, the power to decide on a case-to-case basis whether the particular intrastate activity affects interstate commerce so as to warrant exercise of the power to reach intrastate affairs. Decisions under this type of legislation give the Government no support, for no such determination is required by this Act, and the Government asserts no such finding by anyone is necessary. In other statutes Congress has set up economic regulations which lay hold of activities in interstate commerce but also include intrastate activities so intermingled therewith that separation is impractical or impossible. * * * While general statements, out of these different contexts, might bear upon the subject one way or another, it is apparent that the precise question tendered to us now is not settled by any prior decision.

See also *United States* v. *Bass,* 434 E. 2d 1296 (2nd Cir. 1970) in which the Court of Appeals for the Second Circuit discussed the commerce clause as applied to the federal firearms statute, 18 U.S.C. (Appendix) 1202(a) (Supp V 1970).

The Government counters by relying principally on this Court's decisions in *Katzenback* v. *McClung,* 379 U.S. 294 (1964) and *United States* v. *Darby,* 312 U.S. 100 (1941). But neither *McClung* nor *Darby* hold that the commerce clause vests Congress with the power necessary to sustain the statute challenged here. In *McClung,* the Court upheld Title II, section 201(a) of the Civil Rights Act of 1964, 42 U.S.C. 2000a, as that

section applies to restaurants. But only restaurants which serve or offer to serve interstate travelers or in which a substantial portion of the food served has moved in commerce are reached by the Act. And the section of the Civil Rights Act of 1964 before the Court in *McClung* was a regulatory provision, and not criminal. Unlike Title II of the Consumer Credit Protection Act, the Civil Rights Act does not deprive the person affected of a jurisdictional defense in a criminal trial.[1] To be sure, the Court sustained section 201(a) of the Civil Rights Act because, among other things, it noted that the discrimination prohibited in the facilities covered was found by Congress—with ample evidentiary support—to impede interstate travel. See *Katzenback* v. *McClung, supra* at 299-301. But discrimination in restaurants which have operations affecting commerce is hardly analogous to purely local loan sharking activity completely unconnected with commerce. While such discrimination may be local in a geographic sense, the impact of such discrimination on commerce, whether taken in isolation or as a whole, is nationwide. Here, as we shall show, there is neither the evidentiary support available in *McClung* nor the link with commerce required by the

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[1] We think the difference between a regulatory statute and a criminal statute is significant under the circumstances discussed here. Title II of the Consumer Credit Protection Act, according to its legislative history, is aimed at the loan sharking activities of organized crime and consequently carries a possible penalty of twenty years incarceration and a $10,000 fine. By dispensing with the necessity of showing a federal interest and thus depriving a defendant of a jurisdictional defense, Title II brings within the reach of an extremely harsh sanction a broad mass of purely local activity which is unrelated to the alleged interstate evil Congress may constitutionally proscribe and which is certainly not serious enough to warrant the potential penalty provided.

Civil Rights Act to make rational the finding that the purely local activity reached by the Act affects commerce.

United States v. *Darby,* 312 U.S. 100 (1941) is similar to *McClung.* In *Darby* this Court upheld an indictment drawn under the provisions of the Fair Labor Standards of Act of 1938. Darby was charged with having employees engaged in the production of goods for commerce whose wage and hour conditions violated standards imposed by the Act, and with shipping in interstate commerce goods produced by such employees. He was also charged with violating the record keeping requirements of the Act. Thus, Darby's violation of provisions of the Act could be punished only if the Government could prove that the employees affected produced goods intended for shipment or actually shipped in interstate commerce.

Maryland v. *Wirtz,* 392 U.S. 183 (1968) does not strengthen the Government's position. The 1961 amendment to the Fair Labor Standands Act which this Court upheld in *Wirtz* only changed the basis of employee coverage under the Act. As the Court described the amendment, "instead of extending protection to employees individually connected to interstate commerce, the Act now covers all employees of any 'enterprise' engaged in commerce or production for commerce, provided the enterprise also falls within certain listed categories." [Footnote omitted] Id. at 186. The Court emphasized that the amendment did not change the class of employers affected but merely extended the Act to employees originally excepted. Id. at 193. By the Act's own terms, the employers regulated are engaged in commerce or production for commerce. Furthermore, the Court found a rational basis

for reaching all employees of covered employers, noting: "When a company does an interstate business, its competition with companies elsewhere is affected by all its significant labor costs, not merely by the wages and hours of those employees who have physical contact with the goods in question." Id. at 190. Alternatively, the Court observed that affording the protections of the Act to all employees of an enterprise engaged in commerce or production for commerce was a way of avoiding strife disrupting an enterprise involved in commerce and hence disrupting commerce. Id. at 192. In short, the Fair Labor Standards Act as amended in 1961 reaches only employers engaged in commerce or production for commerce and only those activities which could have an impact on commerce.

Title II of the Consumer Credit Protection Act is not limited to a class of persons, either by way of perpetrator or victim, connected in some way with commerce. Nor is the statute limited in its reach to only those activities which by some rationale has an impact on commerce. It reaches all extortionate credit transactions regardless of amount, relationship between the parties, the number of such transactions made, whether the lender is independent or in association with others, whether an interstate facility or instrumentality is used, or whether the transaction is aimed at an enterprise engaged in or whose operations affect commerce. In sum, it requires no showing by the Government of any federal interest and at the same time opens the federal courts to a broad mass of purely local incidents.

B. Congress Had No Information Before It Upon Which It Could Rationally Conclude That Purely Local Loan Sharking Activity Affects Interstate Commerce.

If the Federal Government has the power to proscribe purely local loan sharking activity through criminal sanctions without a showing on a case by case basis of any federal interest, it has such power only if local loan sharking activity "exerts a substantial economic effect on interstate commerce"[2] or "is so commingled with or related to interstate commerce that all [loan sharking] must be regulated if the interstate commerce is to be effectively controlled."[3] We think the Congressional exercise of power in Title II of the Consumer Credit Protection Act cannot be justified on either ground.

We turn first to the Government's argument that local loan sharking activity exerts a substantial economic effect on interstate commerce. The Government informs the Court that "Congress had before it evidence that loan sharking takes $350 million a year from the poor alone."[4] Because the sum is so large, the Government argues, the "*de minimis* character of individual instances * * * [is] of no consequence."[5] The Government's reasoning on this score seems unsound to us. To be sure, the Government is not limited to the one isolated instance in dispute before the Court in seeking to demonstrate the substantial economic effect on interstate commerce of the purely local activity sought to be proscribed; it may look to the impact

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[2] *Wickard* v. *Filburn*, 317 U.S. 111, 125 (1942).

[3] *United States* v. *Darby*, 312 U.S. 100, 121 (1941).

[4] Government's Brief at 33.

[5] Government's Brief at 33.

generated by all local activity caught within the statute's net. But it may not, as it has done here, rely on the estimated total proceeds derived from the proscribed activity and reason that *all* such activity has a substantial economic effect on interstate commerce. Indeed, it seems to us that this approach begs the question. This is especially true here for the Government informs that Court that the information before Congress supported "the conclusion that, directly or indirectly, almost all loan sharking activities are controlled by organized crime, and that such activities are a major weapon in the assault by the organized underworld upon legitimate commerce."[6] We take this to be a representation that not only are almost all loan sharking activities controlled by organized crime but, because organized crime is interstate in character,[7] almost all loan sharking activities are themselves interstate in character. If the Government's representation is accurate, purely local loan sharking activities are *de minimis* and hence, even taken as a whole, have no impact on interstate commerce.

The Government also argues that the diminished purchasing power of the victims of all loan sharking taken as a basis for federal intervention in the entire field.[8] Under the Government's

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[6] Government's Brief at 34. We do not concede the accuracy of the Government's representation but simply accept it solely for purposes of argument.

[7] See finding (1) of Title II of the Consumer Credit Protection Act.

[8] The Government states: "[T]he transfer each year of [$350 million] from the pockets of the poor to the pockets of those who prey upon them constitutes a 'distortion' which burdens interstate commerce * * *," Government's Brief at 33.

approach there are no limits to the types of purely local criminal activities within the reach of Congress. Certainly the losses generated by robberies, burglars, and other traditionally local crimes affecting property are significant enough, when considered as a whole, to lend support under the Government's approach to federal intervention.

The Government's approach overlooks the benefits derived from a federal state. Laws that proscribe criminal conduct reflect, both in terms of the activity proscribed and the sanction imposed, the attitude and views of the societal or governmental unit which makes the laws. As a result, a class of conduct which is proscribed in one state may not be proscribed in another; the penalty for the commission of a crime in one state may be vastly different in degree from that imposed in another. Thus, for example, loan sharking in the State of New York may be pervasive and serious enough to warrant a comprehensive penal provision carrying severe penalties. On the other hand, loan sharking in rural states, such as Iowa or North Dakota, may be infrequent, isolated, rarely connected with violence, and hardly worthy of the attention or possible penalties believed necessary for the problem in New York.

Alternatively, the Government argues that the statute's proscription on purely loan sharking is "reasonable and appropriate" because requiring proof in each case of a connection with organized crime or interstate commerce would be extremely difficult and would render the federal extortion statute ineffective.[9] First, we do not think the power of the Congress under the

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[9] Government's Brief at 34.

commerce clause can be expanded simply to accommodate the Government's desire to dispense in a criminal prosecution with what it considers a difficult element of proof. The Government's argument on this point is novel and hardly the equivalent of suggesting to the Court that purely local loan sharking activity is so commingled with or related to interstate commerce that it must be proscribed to control interstate commerce. See e.g. *Currin* v. *Wallace,* 306 U.S. 1, 9-11 (1939); *Southern Ry. Co.* v. *United States,* 222 U.S. 20 (1911).

Second, we do not think the Government lacks the ingenuity necessary to draft a criminal statute with a federal element easy to prove. See e.g. Representative Poff's amendment to the Consumer Credit Act (H.R. 11601, 90th Cong., 1st Sess.) which was adopted by the House but later rejected by the Senate House conferees and replaced with the version that was finally enacted. 114 Cong. Rec. 1605-1606.[10] And even if Representative Poff's amendment is viewed as placing a burdensome element of proof on the Government,

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[10] Sec. 102(a) of the Poff amendment contained congressional findings. The two operative sections, sections 102(b) and 102b(2) provided as follows (114 Cong. Rec. 1606):

> (b)(1) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce by loan sharking or attempts so to do shall be fined not more than $10,000 or imprisoned not more than five years, or both.
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> (2)(A) Whoever travels in interstate or foreign commerce or uses any facility in interstate or foreign commerce, including the mail, with intent to promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of loan sharking and
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> (B) thereafter performs or attempts to perform any act described in the preceding clause, shall be fined not more than $10,000 or imprisoned for not more than five years, or both.

there are other ways of accomplishing the same result. If, for example, the statute required the Government to prove that the extortionate transaction was directed against an enterprise whose operations affect interstate commerce, the Government could not be heard to complain about a burdensome element of proof. In fact, the Government suggests to the Court that the statute may be upheld on this ground, i.e. that "the activities of an 'independent' loan shark have significant impact on a borrower who is a businessman dealing in interstate merchandise, as well as the interstate activities of ordinary consumers".[11] But, again, the Government's suggestion offers no justification for reaching the purely local transaction which has no impact on interstate commerce and does not have to be proscribed to achieve the legitimate congressional objective.

Lastly, we turn to the Government's characterization of the evidence before the Congress. It is true that Representative Patman read into the record a feature article on loan sharking activities that had appeared in the *New York Times,* January 28, 1968, and that the article drew upon testimony before a New York State Commission of Investigation into loan sharking activities. But the article, for whatever it is worth, says nothing about the relationship between local extortionate credit transactions and the loan sharking activities of organized crime. 114 Cong. Rec. 1428-1431. As we noted in our brief,[12] the legislative history focuses principally on the relationship between organized crime and loan sharking. See Study of Organized

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[11] Government's Brief at 35.

[12] Petitioner's Brief at 8.

Crime and the Urban Poor introduced into the record by Representative McDade, 113 Cong. Rec. 24461. In fact, the paucity of legislative history which does appear on the subject indicates that there was no information available for Congress to make a judgment on the relationship between purely local transactions and interstate commerce.

The former Deputy Director of the President's Task Force Against Organized Crime, Professor Henry S. Ruth, Jr., testified before the Senate Select Committee on Small Business, 90th Congress, 2nd Sess., May 14, 15, and 16 (hereinafter cited Hearings) (Hearings at 20-21):

> "No one knows the full extent of loan sharking activities in the United States. Many law enforcement officials estimate that gross revenue from this source runs into the multibillion dollar range. Neither is there any way to allocate exact proportions to the amount of loan shark business that is part of, or affiliated with La Cosa Nostra. Certainly in the large cities of the New England, Middle Atlantic and Midwest States, law enforcement personnel believe that high percentage of this business is controlled by organized crime. In Philadelphia many of those who lend money at grossly usurious rates are not directly connected with the Cosa Nostra family operating in the city." [13]

When asked if he was acquainted with loan sharking activities beyond the large cities, and asked for an esti-

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[13] Professor Ruth testified that the only time a Cosa Nostra representative appears is when there is a dispute between debtor and creditor and then only for the purpose of arranging settlement terms.

mate of its prevalence, Professor Ruth replied (Hearings at 29):

> "I do not think I could really be honest and give an estimate of that sort, sir. When we get out of the large cities, I expect that there are people who are available, again in plants, and in the smaller communities, to lend money. But I would not know how they would connect themselves with organized crime."

CONCLUSION

For the reasons stated, it is respectfully submitted that the judgment appealed from should be reversed.

Respectfully submitted,

ALBERT J. KRIEGER
JOEL M. FINKELSTEIN

Attorneys for the Petitioner